Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RUDOLPH E. GRECO, JR.** IA PART 32
Justice

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PATRICIA SMITH-GRANT,

Plaintiff,

-against-

U-HAUL CO. OF ARIZONA,

Defendant.

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Index No.: 703804/15
Motion Date: 2/6/20
Motion Cal. No.: 42 & 43
Motion Seq. No.: 4 & 5

The following numbered papers read on these motions by plaintiff for an order, inter alia, striking defendant's answer, and by defendant for summary judgment, along with defendant's cross-motion for sanctions.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 59 - 82
Notice of Cross-Motion-Affidavits-Exhibits-Aff. in Opp.....	EF 103 - 128
Affirmation in Opposition.....	EF 133 – 137
Replying.....	EF 129 - 132
Notice of Motion-Affidavits-Exhibits.....	EF 85 - 101
Affirmation in Opposition.....	EF 138 - 143
Replying.....	EF 144 - 152

Upon the foregoing cited papers, it is ordered that these motions by plaintiff for, i.a., an order striking defendant's answer, and by defendant for summary judgment, along with defendant's cross-motion for sanctions, are determined as follows:

Plaintiff Patricia Smith-Grant commenced this action to recover for injuries she allegedly suffered in a motor vehicle accident that occurred on October 6, 2014, which occurred on Beach Channel Drive at or near its intersection with Regina Avenue, Queens, NY. On October 5, 2014, plaintiff had rented a truck, from defendant U-Haul Co. of Arizona (UHAZ), to move. On October 6, 2014, plaintiff alleges that, on her way to return the truck, she attempting to bear left to stay on Beach Channel Drive, when the truck's steering wheel locked causing her to crash into a house located 11-10 Beach Channel Drive, Far Rockaway, Queens, NY.

Plaintiff now seeks an order striking defendant's answer, or alternatively, an order directing that an adverse inference charge be given at trial against defendant as a sanction for its alleged intentional and negligent spoliation of key evidence, and compelling discovery, pursuant to CPLR 3126, 3124, and 3120(1)(ii). Defendant cross-moves for sanctions against plaintiff. Defendant also moves for summary judgment, pursuant to CPLR 3212.

The nature and degree of a sanction imposed pursuant to CPLR 3126 lies within the sound the discretion of the trial Court (*see Field v Bao*, 140 AD3d 921, 922 [2d Dept 2016]; *see generally Kihl v Pfeffer*, 94 NY2d 118 [1999]). Where a defendant "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to

have been disclosed," the court may, inter alia, strike an answer as a sanction (CPLR 3126; *see Hoi Wah Lai v Mack*, 89 AD3d 990, 991 [2d Dept 2011]). However, the sanction of striking an answer is unwarranted, absent a clear showing that the defendant's failure to comply with discovery-demands and/or court-ordered discovery was willful or contumacious (*id.*; *see Sinclair v City of New York*, 153 AD3d 876, 876 [2d Dept 2017]). "The willful and contumacious character of a party's conduct can be inferred from either the repeated failure to respond to demands or comply with discovery orders, without demonstrating a reasonable excuse for these failures, or the failure to comply with court-ordered discovery over an extended period of time" (*Wolf v Flowers*, 122 AD3d 728, 729 [2d Dept 2014]).

The Court finds that there is no clear showing that defendant's failure to comply with discovery-demands and/or court-ordered discovery was willful or contumacious (*id.*; CPLR 3126; *see Kihl*, 94 NY2d 118; *Sinclair*, 153 AD3d at 876; *Field*, 140 AD3d at 922; *Hoi Wah Lai*, 89 AD3d at 991). Furthermore, the Court finds that defendant has provided a reasonable excuse (*id.*). Therefore, plaintiff is not entitled to an order striking defendant's answer (*id.*).

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Tanner v Bethpage Union Free School District*, 161 AD3d 1210 [2d Dept 2018], quoting *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). There is a presumption of relevancy of the destroyed evidence, where such evidence is determined to have been intentionally or willfully destroyed; however, where the evidence is determined to have been destroyed negligently, the party seeking spoliation sanctions must demonstrate that such destroyed evidence was relevant to the party's claim or defense (*Pegasus Aviation I, Inc.*, 26 NY3d at 547-48).

Here, plaintiff failed to establish that defendant intentionally, willfully or negligently destroyed evidence, including, but not limited to, the power steering reservoir and the brake master cylinder reservoir. Moreover, the record shows that defendant did not intentionally, willfully or negligently destroyed evidence. Thus, plaintiff is not entitled to an order directing a negative inference charge be given at trial (*id.*; *Tanner*, 161 AD3d at 1210; *Eksarko v Associated Supermarket*, 155 AD3d 826, 828-29 [2d Dept 2017]).

Furthermore, the Court finds that plaintiff has no basis to believe that the redacted names and personal information of over 300 nonparty prior renters listed in a Rental Transaction History for the subject truck will result in relevant evidence (*see Forman v Henkin*, 30 NY3d 656, 661 [2018]; *Mendives v Curcio*, 174 AD3d 796, 797-98 [2d Dept 2019]; *D'Alessandro v Nassau Health Care Corp.*, 137 AD3d 1195, 1196 [2d Dept 2016]). Additionally, the Court finds that plaintiff's motion to compel unredacted documents, disclosing personal information of over 300 nonparty prior renters, is merely an impermissible fishing expedition (*id.*; *Whitfield v Board of Educ. of City of Mount Vernon*, 14 AD3d 551, 552 [2d Dept 2005]). Therefore, plaintiff is not entitled to an order compelling the requested (*id.*). Additionally, the Court finds that sanctions against plaintiff are not warranted (*see* 22 NYCRR 130-1.1).

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-46 [2d Dept 2006]). Thus, where the movant fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

Pursuant to 49 USC § 30106, aka the Graves Amendment, "the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if the owner (i) is engaged in the trade or business of renting or leasing motor vehicles, and (ii) engaged in no negligence or criminal wrongdoing" (*Anglero v Hanif*, 140 AD3d 905, 906 [2d Dept 2016], quoting *Bravo v Vargas*, 113 AD3d 579, 580 [2d Dept 2014]).

However, the Graves Amendment does not apply where a plaintiff seeks to hold the owner of a vehicle liable for the alleged failure to maintain the rented vehicle (*see Couchman v Nunez*, 115 NYS3d 708 (Mem), 708-09 [2d Dept 2020]; *Zielinski v New Jersey Transit Corporation*, 170 AD3d 927, 928-29 [2d Dept 2019]; *Lozano v Magda, Inc.*, 165 AD3d 1249, 1249 [2d Dept 2018]; *Casine v Wesner*, 165 AD3d 749, 749-50 [2d Dept 2018]; *Currie v Mansoor*, 159 AD3d 797, 798 [2d Dept 2018]; *Nelson v Citiwide Auto Leasing, Inc.*, 154 AD3d 863, 865 [2d Dept 2017]; *Reifsnyder v Penske Truck Leasing Corp.*, 140 AD3d 572, 573 [2d Dept 2016]; *Anglero*, 140 AD3d at 906-07; *Lynch v Baker*, 138 AD3d 695, 696-97 [2d Dept 2016]; *Olmann v Neil*, 132 AD3d 744, 745 [2d Dept 2015]; *Bravo*, 113 AD3d at 580; *Ballatore v Hub Truck Rental Corp.*, 83 AD3d 978, 979-81 [2d Dept 2011]; *Vidal v Tsitsiashvili*, 297 AD2d 638, 638 [2d Dept 2002]). In those cases, to prevail on a summary judgment motion, a defendant owner must establish that: (1) it was engaged in the business of renting vehicles; (2) the subject vehicle had been rented out at the time of the accident; (3) regular maintenance was performed on the subject vehicle; and (4) the condition of the vehicle was not a proximate cause of the accident (*id.*).

Here, it is undisputed that defendant engaged in the business of renting vehicles and that the subject vehicle had been rented out at the time of the accident. Additionally, the evidence demonstrates that defendant regularly maintained the subject truck, including its steering and braking systems. The evidentiary submissions also show that the subject truck had been inspected less than three weeks before the accident, and 10 times within the prior 12 months, and no defect was found. Moreover, the evidence shows that there was no report or other evidence of steering or brake failure before the accident. The Court further finds that the evidence demonstrates that the condition of the truck was not a proximate cause of the accident. Based on all the evidence, contradictions within plaintiff's testimony, and the fact that plaintiff added to her story without any substantiating evidence, the Court finds that her testimony was demonstrably false and should be rejected as incredible as a matter of law (*see Carthen v Sherman*, 169 AD3d 416 [1st Dept 2019]). Furthermore, the evidence, including plaintiff's own testimony and statements made to the police, show that she was operating the truck with little to no sleep, and that her fatigue and drowsiness were a

proximate cause of the accident (*see Couchman*, 115 NYS3d at 708-09; *Zielinski*, 170 AD3d at 928-29; *Lozano*, 165 AD3d at 1249; *Casine v*, 165 AD3d at 749-50; *Currie*, 159 AD3d at 798; *Nelson*, 154 AD3d at 865; *Reifsnyder.*, 140 AD3d at 573; *Anglero*, 140 AD3d at 906-07; *Lynch*, 138 AD3d at 696-97; *Olmann*, 132 AD3d at 745; *Bravo*, 113 AD3d at 580; *Ballatore*, 83 AD3d at 979-81; *Vidal*, 297 AD2d at 638). Additionally, the physical evidence and data, including, but not limited to, crash site measurements and the Bosch Crash Date Retrieval Report, demonstrate that the condition of the truck was not a proximate cause of the accident (*id.*). Thus, defendant established its entitlement to summary judgment as a matter of law (*id.*).

In opposition, plaintiff submits, inter alia, an affidavit of Peter Scalia, Professional Collision Reconstructionist and Forensic Vehicle Examiner. The Court finds that plaintiff failed to raise a triable issue of fact (*id.*). Moreover, even if the Court found that Scalia's affidavit raised a triable issue of fact, defendant's reply papers sufficiently rebutted any such allegations that were raised for the first time in plaintiff's opposition papers (*id.*; *Baptiste v Ditmas Park, LLC*, 171 AD3d 1001, 1002 [2d Dept 2019]; *Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879-80 [2d Dept 2015]; *David v Chong Sun Lee*, 106 AD3d 1044, 1045 [2d Dept 2013]).

Accordingly, plaintiff's motion and defendant's cross-motion are denied, and defendant's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's complaint is dismissed; and it is further

ORDERED that any and all counterclaims and crossclaims are hereby dismissed; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within thirty (30) days of the date of entry.

This constitutes the decision and order of this Court.

Dated: March 4, 2020

RUDOLPH E. GRECO, JR., J.S.C.

FILED
MAR 12 2020
COUNTY CLERK
QUEENS COUNTY